No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

APPELLANTS' REPLY BRIEF.

DION R. HOLM,
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The counsel for the appellee admit that Jew Ben On is the minor son of Jew Ngow, and that Jew Ngow is a Chinese laborer lawfully in the United States, and that he *first* entered the United States in 1880, and obtained a certificate of residence under the act of Congress of 1893.

They concede that Jew Ngow was a Chinese laborer lawfully in the United States when the treaty of 1880 between the United States and China was ratified.

Article II of that treaty is as follows:

> "Chinese subjects, whether proceeding to the United States as teachers, students merchants, or from curiosity, together with their body and

> household servants, and *Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord,* and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the *citizens and subjects of the most favored nation.*"

In the case of Ah Moy, on habeas corpus, 21 Fed. Rep.785, cited by counsel for the appellee, Judge Sawyer in the closing paragraph of his concurring opinion in that case said:

> "It is greatly to be regretted that every question fairly arising upon the rights of the Chinese under the treaties with China and the restrictions cannot be taken to the supreme court for an authoritative determination. These questions are of the highest international importance, and ought not to be finally adjudged by the local courts of original jurisdiction. * * *"

Counsel for the appellee in discussing the case of United States v. Gue Lim, 176 U. S. 459, cited by appellants, say:

> "that case turned upon the true meaning of section 6, act of July 5, 1884, which required every Chinese person other than laborers as a condition of admission to present a specified certificate. The conclusion was that the section should not be construed to exclude their wives, *since this would obstruct* the plain purpose of the treaty of 1880 to *permit merchants freely to come and go.*"

It will be noted from a reading of article II of the treaty of 1880 that Chinese laborers who were

then in the United States are given the same privilege to go and come of their own free will as merchants; therefore, it follows, that if the exclusion of the wives and families of Chinese merchants is contrary to the plain purpose of the treaty, that equally violative of the treaty would be the exclusion of the families of Chinese laborers who were lawfully in the United States at the time of its ratification.

In the case of the United States v. Gue Lim, 176 U. S. 459 (44 L. Ed. 544), the Supreme Court said:

> "* * * It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out the provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty. As was stated by Mr. Justice Harlan in Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255: 'The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. * * * Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings * * * the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment,

> that these considerations were present in the minds of the members when the legislation in question was enacted.' We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions of the treaty. * * * While the literal construction of the section would require a certificate, as therein stated, from every Chinese person, other than a laborer, who should come into the country, yet such a construction leads to what we think an absurd result, for it requires a certificate for a wife of a merchant, among others, in regard to whom it would be impossible to give the particulars which the statute requires shall be stated in such certificate. * * *''

There are now comparatively few Chinese laborers in the United States who were here when the treaty of 1880 was ratified. All of those Chinese laborers were required to register, and the Government has an accurate and complete registration of such persons.

It is difficult to conceive how the exclusion of the wives of Chinese merchants obstructs the plain purpose of the treaty of 1880, permitting such merchants to go and come of their own free will, and the exclusion of the wives of Chinese laborers, who were lawfully in the United States when said treaty was ratified, would not have the same effect.

In the case of United States v. Chu Chee et al., 93 Fed. 797, cited by the appellee, the defendants in that case sought to justify their right to remain in this country by assuming the occupation of members of the privileged class. This

court held that the right of said defendants to land in this country was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by section 6 of the act of 1882 as amended.

In the case of Yee Won v. White, 41 Supreme Court, 65 L. Ed. 600, it will be noted that the petitioner therein named was first permitted to enter the United States in *1901*, twenty-one years after the ratification of the treaty of 1880.

In the instant case it is conceded that Jew Ngow was a Chinese laborer lawfully within the United States before the ratification of the treaty of 1880. Under the express provisions of article II of that treaty he is a privileged or exempt person.

It is manifest, we submit, that the closing paragraph of the opinion rendered by Mr. Justice McReynolds in the case of Yee Won v. White, supra, must be read in the light of the facts of that particular case, and in connection with the context, viz:

> "* * * This well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of *Chinamen* who *first* came *after* the RATIFICATION of the treaty, as members of an exempt class, and later assumed the status of laborers."

When so considered it is obvious that the court was referring *not* to the *wives* and *minor children* of Chinese laborers who *first* came to this country *after* the *ratification* of the treaty of 1880, but to the

Chinamen themselves, and therefore the wife and children of the petitioner in that case were not entitled to land.

The Supreme Court did not, as we read the decision in the case of Yee Won v. White hold that the wife and minor children of a Chinese laborer who was in this country when the treaty of 1880 was ratified would be denied entry, as this precise question was not involved in that case. The petitioner in that case *first* came to this country in 1901.

It is instructive to note that the Solicitor General of the United States in the brief filed by him in the case of Yee Won v. United States, said:

> "All the legislation of Congress on this subject has been directed to the exclusion from this country of Chinese laborers.
>
> The prohibition against such laborers coming into this country is absolute, with two exceptions. Such *laborers* in this country at the time the treaty of 1880 was entered into are permitted to leave the country and return, *and, indeed, are put in the same class with merchants.*"

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
March 1, 1922.

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